80-180

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

NO._____

W. C. McDANIEL, ET AL.,
Petitioners

v.

JOSE SANCHEZ, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in holding that a reapportionment plan for the four commissioners precincts of Kleberg County, Texas was not court-ordered and could not be implemented until precleared under Section 5 of the Voting Rights Act, 42 U.S.C. 1973(c), when the plan (a) was prepared and presented in response to an order by the district court, (b) was not prepared by county officials but by a third party expert, (c) was not adopted by the county before submission to the court, (d) was considered by the trial court to be court-ordered, and (e) was put into effect only after county officials were ordered to do so by the trial court?

2. Since the facts underlying the preparation and implementation of the Kleberg County reapportionment plan were identical to those in *East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), in which it was held that a plan so conceived and presented was court-ordered and required no Section 5 preclearance, did the Court of Appeals err in holding that the plan was legislative, and that the trial court had no authority to assess the plan's constitutionality and order it into effect without Section 5 preclearance?

PARTIES TO THE PROCEEDING

Petitioners, who were appellees in the Court of Appeals and defendants in the District Court, are W. C. McDaniel (County Judge of Kleberg County, Texas), V. T. Collins, Earl Hubert, and Doyle Dreyer (Kleberg County Commissioners), Ura Dean Ware (Kleberg County Clerk), and J. S. Scarborough III (Kleberg County Sheriff).

Respondents, who were appellants in the Court of Appeals and plaintiffs in the District Court, are Jose Sanchez, Israel Trevino, Natividad De La Rosa and Santos De La Rosa, who sued "on their own behalf and on behalf of all registered voters" and on behalf of all "similarly situated Mexican-American voters residing within County Commissioners' Precincts 1, 2 and 3." (Plaintiffs' First Amended and Supplemental Complaint, paragraphs 19 and 20)

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Petitioners, W. C. McDaniel (County Judge of Kleberg County, Texas), V. T. Collins, Earl Hubert, Doyle Dreyer (Kleberg County Commissioners), Ura Dean Ware (Kleberg County Clerk), and J. S. Scarborough III (Kleberg County Sheriff), respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this cause on April 14, 1980.

OPINIONS BELOW AND IN THIS COURT

The following, listed in chronological order, are the pertinent opinions and orders of the trial court and of the United States Court of Appeals for the Fifth Circuit:

(1) The District Court's Memorandum and Order of October 2, 1979 finding a constitutionally impermissible numerical disparity between the four Kleberg County Commissioners precincts but finding no dilution of Mexican-American voting strength, and ordering that a new plan be prepared. (Appendix, p. A-1)

(2) The District Court's Order, dated January 10, 1980, declaring the new reapportionment plan to be constitutionally acceptable, finding that the plan was court-ordered rather than legislative such that preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. 1973(c), was not required, and directing that the 1980 primary and general elections be conducted thereunder. (Appendix, p. A-21)

(3) The District Court's Order of January 29, 1980 noting that the Court had "filed an order implementing a new apportionment plan for the 1980 elections" and denying respondents' motion for injunction pending appeal. (Appendix, p. A-24)

(4) Opinion Order of the United States Court of Appeals for the Fifth Circuit, dated April 14, 1980, declaring that the reapportionment plan in question was legislative rather than court-ordered, vacating the judgment of the trial court, and remanding the case for appropriate action. Reported at 615 F.2d 1023. (Appendix, p. A-26)

(5) Notification from the Clerk of the United States Court of Appeals for the Fifth Circuit, dated April 25, 1980, of the issuance on that date of the Court's Mandate. (Appendix, p. A-30)

(6) Order of the District Court, dated April 30, 1980, denying respondents' motion to enjoin the conduct of the May 3, 1980 primary election of county commissioners in Kleberg County. (Appendix, p. A-31)

(7) Letter from the Clerk of the United States Court of Appeals for the Fifth Circuit, dated May 12, 1980, advising that on that date petitioners' motion for rehearing and for rehearing en banc had been denied. (Appendix, p. A-33)

(8) District Court's Order, dated June 20, 1980, directing petitioners to immediately begin Section 5 preclearance procedure with respect to the plan for reapportionment of the commissioners precincts of Kleberg County. (Appendix, p. A-34)

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on April 14, 1980 (Appendix, p. A-26) and the mandate was issued on April 25 (Appendix, p. A-30). A petition for rehearing and for rehearing en banc was overruled on May 12, 1980 (Appendix, p. A-33).

This Court has jurisdiction to review the opinion rendered below pursuant to the provisions of Title 28 U.S.C. § 1254.

STATEMENT OF THE CASE

In Texas the Commissioners Court is the governing body of a county. It consists of a county judge and four commissioners. The county judge is elected countywide. One county commissioner is elected from each of four commissioners precincts into which the county is divided pursuant to state law, and serves for a term

of four years. The terms are staggered; two commissioners are elected every two years.

This class action, filed on January 26, 1978, asserted that the populations of the four commissioners precincts of Kleberg County, Texas were so unequal as to violate the constitutional one man, one vote principle and, in addition, that the existing boundary lines of the four precincts divided Mexican-Americans and Anglos in such a fashion as to unconstitutionally dilute the voting strength of Mexican-Americans. Among the relief sought in Plaintiffs' First Amended and Supplemental Complaint was a judgment "granting plaintiffs: . . . (d) the adoption" of a new election plan.

Jurisdiction in the trial court was based upon the provisions of 28 U.S.C. 1343 (3) and (4) which give a United States District Court original jurisdiction of all suits brought pursuant to 42 U.S.C. 1983 to redress deprivation under color of state law of any right, privilege or immunity secured by the Constitution of the United States.

After a trial on the merits the district court concluded that reapportionment was necessary to correct population disparities, but found that there had been no dilution of the voting strength of Mexican-Americans. The court "directed" the defendants* to submit a proposed new plan by November 13, 1979 and scheduled and conducted a hearing thereon on December 10, 1979. (Memorandum and Order of October 2, 1979; Appendix, p. A-1)

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* The parties will henceforth be referred to as they were in the trial court: the petitioners-county officials were defendants and respondents were plaintiffs.

Plaintiffs filed no objection to the order, to the proposed procedure, nor to the reapportionment plan which was served upon them and filed with the Court as directed. At the December 10 hearing they attacked with expert testimony the manner in which the plan distributed Mexican-Americans among the four precincts and, for the first time, orally objected to the plan because it had not been precleared under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(c).

The evidence heard by the Court on December 10 established that the plan submitted to the Court had been prepared by Dr. Robert T. Nash, Dean of the Business School of Texas A&I University. (R. 7) Nash had been given no instructions by the defendants other than that he was to draw commissioners precinct boundary lines which would achieve equality of population. (R. 22)

It was undisputed that the Commissioners Court had not adopted the plan which Nash prepared, nor otherwise purported to reapportion itself. It had merely voted that the plan be submitted to the Court for its action thereon, as ordered. Formulated in December, as it was, the plan was one which the Commissioners Court was prohibited by state law from adopting since it altered the makeup of the county's voting precincts. (R. 12-13; Article 2.04, Texas Election Code) As the Court of Appeals specifically acknowledged, the Commissioners Court did nothing more than "[review] Dr. Nash's work and officially [adopt] his proposal *as the plan it would submit to the district court.*" (Fifth Circuit Opinion, Appendix, p. A-27) (emphasis added)

After considering evidence on the Nash plan from all parties, the district court concluded that the plan re-

medied the malapportionment previously found. Relying on *East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), the court held that the plan was court-ordered rather than legislative and that it was therefore not subject to the preclearance provisions of Section 5 of the Voting Rights Act; it ordered that "the 1980 primary and general elections should be conducted" thereunder. (District Court's Order of January 10, 1980; Appendix, p. A-23)

Dissatisfied because the trial court did not require preclearance of the plan under Section 5 of the Voting Rights Act, the plaintiffs perfected an appeal to the Court of Appeals for the Fifth Circuit and, in connection therewith, requested a summary reversal or, in the alternative, an injunction against the conduct of the scheduled May, 1980 election of two county commissioners pursuant to the plan.

In a *per curiam* opinion dated April 14, 1980, a panel of the Fifth Circuit, citing only *Wise v. Lipscomb,* 437 U.S. 535, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978), and with no mention at all of *East Carroll Parish,* held that the plan was legislative, that it required Section 5 preclearance, and that the "district court erred in considering the constitutionality of the proposed plan." It vacated the trial court's order and remanded the case on April 14, notwithstanding that the primary election was scheduled for May 3. (Fifth Circuit's Opinion; Appendix, p. A-26)

Defendants promptly moved for a rehearing and a rehearing en banc. While the motion was pending, plaintiffs requested the trial court to enjoin the imminent primary election. The trial court permitted the election

to proceed, but enjoined announcement of the results. (Order of April 30, 1980; Appendix, p. A-31)

On May 12, 1980, the Fifth Circuit denied defendants' petition for rehearing. (Letter Notice; Appendix, p. A-33) Plaintiffs returned to the trial court once again, this time to seek an order directing defendants to commence Section 5 preclearance procedures immediately. Defendants responded that such an order would render moot their petition to this Court for certiorari. After hearing evidence and argument, the trial court directed defendants to commence preclearance procedures "immediately." (Order of June 20, 1980; Appendix, p. A-34) A stay of this order is presently being sought.

In the meantime, this petition has been timely filed to seek a correction of the Fifth Circuit's erroneous holding that the plan which the trial court ordered into effect was not court-ordered, and that Section 5 preclearance was therefore required.

REASONS FOR ALLOWING THE WRIT

Two good reasons exist for granting this petition for writ of certiorari. The first is that there will be a substantial volume of reapportionment litigation in the wake of the 1980 census as various governmental subdivisions redistribute their populations for voting purposes. As the racial or ethnic impacts of the newly adopted plans are challenged and changes are ordered, litigants and the lower courts will need to know the circumstances under which a plan will be considered legislative and subject to preclearance under Section 5 of the Voting Rights Act and when it will be considered court-ordered and need not be precleared.

The second reason for granting this petition is that the panel below concluded that the plan ordered into effect by the trial court was not court-ordered, and therefore was subject to Section 5 preclearance, citing only *Wise v. Lipscomb,* 437 U.S. 535, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978) in support, and ignoring completely this Court's decision in *East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976) and a different Fifth Circuit panel's decision in *Marshall v. Edwards,* 582 F.2d 927 (1978), *cert. den.,* 442 U.S. 909, 99 S.Ct. 2820, in both of which the facts surrounding the formulation and submission of the plan were identical to those in the instant case, but in both of which a contrary conclusion was reached—that the plans were court-ordered and not subject to preclearance. In short, the Fifth Circuit panel committed an egregious error which should be corrected here.

Thus far this important question of when a court-inspired plan must be precleared has been relegated to footnote treatment in two of this Court's decisions, *East Carroll Parish School Board v. Marshall, supra* at note 6, and *Morris v.Gressette,* 432 U.S. 491, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977) at note 8, and to a decision in which a majority of this Court could agree on the result but not the reasons therefor—*Wise v. Lipscomb, supra.*

The little that has been written on the subject has left confusion in its wake. See *Marshall v. Edwards,* 582 F.2d 927, 932-33 (5th Cir. 1978), *cert. den.,* 442 U.S. 909, 99 S.Ct. 2820, in which a panel of the Fifth Circuit acknowledges its uncertainty and struggles to reconcile what has been said.

In *East Carroll Parish,* a police jury and school board, held to be malapportioned to an unconstitutional degree, prepared and filed a reapportionment plan pursuant to court order. The trial court approved the plan as submitted. Dissatisfied parties appealed from that order on the ground that it diluted the black vote. The United States filed an *amicus* brief with the Supreme Court in which it argued that Section 5 preclearance was required prior to adoption by the district court of a reapportionment plan submitted to it on behalf of a local legislative body that was covered by the Act. This Court disposed of the contention in the following language:

> [C]ourt-ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by § 5. Had the East Carroll police jury reapportioned itself on its own authority, clearance under § 5 of the Voting Rights Act would clearly have been required. *Connor v. Waller,* 421 U.S. 656, 95 S.Ct. 2003, 44 L.Ed.2d 486 (1975). However, in submitting the plan to the District Court, the jury did not purport to reapportion itself in accordance with the 1968 enabling legislation, see n. 2, *supra* and statutes cited therein, which permitted police juries and school boards to adopt at-large elections. . . . Moreover, since the Louisiana enabling legislation was opposed by the Attorney General of the United States under § 5 of the Voting Rights Act, the jury did not have the authority to reapportion itself. * * * Since the reapportionment scheme was submitted and adopted pursuant to court order, the pre-clearance procedures of § 5 do not apply. *Connor v. Johnson,* 402 U.S. 690, 691, 91 S.Ct. 1760, 1761, 29 L.Ed.2d 268, 270 (1971).

East Carroll Parish School Board v. Marshall, 424 U.S. 636 n. 6, 96 S.Ct. 1083 n. 6, 47 L.Ed.2d 296 (1976).

Precisely the same circumstances existed in the instant case. Petitioners submitted a plan in obedience to a court order to do so; they did not presume to reapportion the county "on their own authority." And they were prohibited by State law from reapportioning the county at the time the plan was submitted since it altered voting precincts in the county (R. 12-13) and such changes may be made only during a July or August term. Texas Election Code, Article 2.04(1). The Texas courts have construed this provision to mean that the commissioners court has no authority to redraw precinct boundary lines in any month other than those specified. *Wilson v. Weller,* 214 S.W.2d 473 (Tex. Civ. App. 1948, no writ). Thus, when in October of 1979 the trial court ordered the submission of a new reapportionment plan by November 13, it was directing petitioners to do that which they were prohibited by state law from doing on their own authority. Although the facts here were identical to those before the Court in *East Carroll Parish,* the Fifth Circuit panel reached a different result. Significantly, the panel made no mention of *East Carroll Parish* in its *per curiam* opinion, although that case was the foundation stone of petitioners' brief.

In *Marshall v. Edwards,* 582 F.2d 927 (5th Cir. 1978), *cert. den.,* 442 U.S. 909, 99 S.Ct. 2820, the trial court had required the parties to submit single member district plans. The police jury and school board employed an expert witness to prepare the plan which they submitted. They did not adopt the plan but merely took the action necessary to submit it to the court, "that is the only thing adopted." 582 F.2d at 933. The panel concluded that *East Carroll Parish* controlled and that the plan was court-ordered, not legislative. It cited as reasons for its con-

clusion (1) that the police jury and school board had not adopted the plan but merely authorized its submission to the court, (2) that the court "seem(ed) to indicate that he saw this as a court-ordered plan," and (3) that the police jury and school board were without authority to reapportion themselves because the only source of such authority was the same statute which the Attorney General had held violative of Section 5 of the Voting Rights Act and which was discussed in footnote 6 in *East Carroll Parish.*

The facts of the instant case are identical in every respect to those in *Marshall v. Edwards,* yet the conclusion reached was different. The panel did not discuss *Marshall v. Edwards,* though it, too, was prominently treated in petitioners' brief.

Morris v. Gressette, supra, is still another opinion of this Court which was cited to but ignored by the panel below. In that case this Court once again made the distinction which the panel below failed to make:

> [R]eapportionment legislation adopted by the Legislature on its own authority in the course of litigation is not effective in a covered jurisdiction until after compliance with § 5's preclearance review provisions. (Such legislation is to be distinguished from a 'reapportionment scheme . . . submitted and adopted pursuant to court order,' for which preclearance is not required. * * *

432 U.S. at 497, 97 S.Ct. at 2416, fn. 8.

The panel below relied solely on the holding of this Court in *Wise v. Lipscomb, supra,* the facts of which are clearly distinguishable. But even applying the reasoning of the various concurring and dissenting opinions in *Wise*

to the facts of the instant case, the conclusion is still inescapable that the plan here is court-ordered and not legislative.

Justices White and Stewart apparently based their conclusion that the plan in *Wise* was legislative on their view that the Dallas City Council had reapportioned itself voluntarily rather than merely submitting the reapportionment plan to the court before adopting it. In the instant case the Kleberg County officials did not adopt the plan for implementation but only "adopted (Nash's) proposal as the plan it would submit to the District Court." (Fifth Circuit's Opinion; Appendix, p. A-27) They likewise placed emphasis on the fact that the Dallas City Council, unlike the *East Carroll* police jury, was not precluded by statute from reapportioning itself. In this respect the instant facts more closely resemble *East Carroll Parish* than *Wise* because the commissioners court was not free to adopt the plan in question.

Mr. Justice Powell joined by the Chief Justice and Justices Blackmun and Rehnquist, in a concurring opinion in *Wise,* stated that the essential consideration which rendered the Dallas City Council's plan legislative was that "the Dallas City Council exercised a legislative judgment, reflecting the policy choices of the elected representatives of the people, rather than a remedial directive of a federal court." ____ U.S. at ____, 98 S.Ct. at 2501. In the instant case it could scarcely be said that a mathematical redistribution of Kleberg County's 1970 census population by a college professor was the exercise of legislative judgment which reflected the policy choices of elected representatives, rather than the remedial directive of a federal court. The trial court

had held that there had been no discrimination or dilution of minority voting strength, but had invalidated the county's existing apportionment because it was not mathematically acceptable. The trial court did not "invite" the submission of a new plan, it "directed" that a plan be prepared and submitted. (District Court's Memorandum and Order of October 2, 1979; Appendix, p. A-19) And it did not leave the matter of whether to implement the plan to the legislative judgment of the county officials, it "ordered" that the 1980 primary and general elections be conducted pursuant thereto. (District Court's Order of January 10, 1980; Appendix, p. A-23) So it would appear that these four justices who concurred in the result reached in *Wise* that the plan there under consideration was legislative because a product of legislative judgment should agree that the plan in the instant case was court-ordered.

Finally, Mr. Justice Marshall, joined by Justices Brennan and Stevens, dissented from the majority judgment in *Wise* on the ground that they saw no distinction between the facts there and those before the court in *East Carroll Parish*. They would have held the plan to be court-ordered, and on the same grounds would undoubtedly consider the instant plan court-ordered, contrary to the holding of the panel below.

Aside from the consideration that the Fifth Circuit's decision does not comport with precedent, there is no historical reason underlying the enactment of the Voting Rights Act for requiring that a plan conceived, submitted, and reviewed as the instant one was be submitted for Section 5 preclearance.

A state does not become subject to Section 5 of the Voting Rights Act until it has been administratively determined that certain conditions which experience has proved are indicative of racial discrimination in voting have existed. *United Jewish Organizations of Williamsburg, Inc. v. Carey,* 430 U.S. 144, 156-157, 97 S.Ct. 996, 1005, 51 L.Ed.2d 229 (1977). The Act is described by this Court as an effort by Congress to thwart "the ingenuity of those bent on preventing Negroes [and now other minorities] from voting." *Allen v. State Board of Elections,* 393 U.S. 544, 548, 89 S.Ct. 817, 823, 22 L.Ed.2d 1 (1969). The provision of Section 5 for preclearance by submission to the Attorney General of the United States "merely gives the covered State a rapid method of rendering a new state election law enforceable." *Id.,* 393 U.S. at 549, 89 S.Ct. at 823. And even though a state has obtained Section 5 preclearance, "private parties may enjoin the enforcement of the new [plan] only in traditional suits attacking its constitutionality." *Id.,* 393 U.S. at 549-550, 89 S.Ct. at 823. See also *South Carolina v. Katzenbach,* 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966).

It may be true that a covered state or subdivision thereof which voluntarily embarks upon a new election scheme should be required to demonstrate that the new plan has no adverse effect on minorities who have been the subject of past discrimination. But where, as here, the adoption of a new voting arrangement is not voluntarily undertaken but has been ordered by a trial court; when the governmental entity has not been free to formulate and implement whatever plan may suit its purpose but, instead, has been ordered to submit the plan to a federal district court already familiar with the problems giving rise to

the need for a change in the first instance, and with a ready ability to understand and evaluate the impact of the plan on minorities; and when the plan may not be put into effect until permitted by the federal court, as in the instant case in which the Court retained jurisdiction, no purpose is served in requiring that such a plan be precleared by a federal district court sitting in Washington or by the Attorney General of the United States. Certainly such a procedure is not the "rapid method of rendering a new state election law enforceable" referred to in *Allen, supra,* as compared with review and approval by a district court in which an action to review past voting rights infringements and a remedy thereto is already before the court with the facts fully developed.

If the trial court had merely struck down the current commissioners precinct arrangement in Kleberg County, and had entered a final judgment directing that a new plan be prepared, leaving the matter of preclearance or not to the county, and otherwise washing its hands of the case, it is understandable that a new plan thereafter adopted by the county should be subject to Section 5 preclearance. But that is not the case here. The county was not free to adopt whatever plan it chose. The plan which was prepared at the direction of the trial court was submitted to the trial court and evidence was heard with respect to the equality of population in the four commissioners precincts and with respect to the plantiffs' claim that the new plan adversely affected the voting rights of Mexican-Americans. That issue was resolved against the plantiffs and the plan was ordered implemented. There is no logic or efficiency in requiring a plan which has been thus reviewed by a federal court to be reviewed again by a three-judge court in Washington,

D.C. or by the Attorney General of the United States, depending upon the course chosen by the county officials. This is simply not a fact situation which presents the potential for discrimination against voters to which Section 5 of the Voting Rights Act was directed.

CONCLUSION

For the reasons set forth above, petitioners respectfully pray that a writ of certiorari issue to review and correct the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C.A. NO. C-78-11

JOSE SANCHEZ, ET AL.

v.

W. C. McDANIEL, ET AL.

MEMORANDUM AND ORDER

(Filed October 2, 1979)

This is a class-action suit brought by Plaintiffs Jose Sanchez, Israel Trevino, Natividad de la Rosa, and Santos de la Rosa, seeking injunctive and declaratory relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201-2202. Plaintiffs are seeking to enjoin the future elections for County Commissioners for Kleberg County, Texas, due to the alleged malapportionment of the commissioners' precincts. Plaintiffs also allege that the present apportionment plan for the commissioners' precincts unconstitutionally dilutes the voting power of Mexican-Americans in Kleberg County.

The Defendants are various county officials for Kleberg County, including the county judge, the county commissioners, the county clerk, and the county sheriff. The Democratic and Republican party county chairmen were also originally sued, as was the Texas Secretary of State;

these Defendants, however, were dismissed. Jurisdiction for this suit is based on 28 U.S.C. §§ 1343(3) and 1343 (4).

Class Action

Plaintiffs brought this suit seeking to represent two classes of voters in Kleberg County. Plaintiffs first seek to represent all registered voters in Kleberg County who are denied a vote of equal weight in the election of county commissioners due to the alleged malapportionment of the Commissioners Court precincts. The Court certified this class of voters on June 13, 1978.

Plaintiffs are also seeking to represent all Mexican-American voters in Kleberg County whose voting power has allegedly been diluted under the present apportionment plan. Plaintiffs did not move for certification of this class prior to trial. Nevertheless, both Plaintiffs and Defendants, by post trial briefs, have moved for certification of this class. After reviewing the testimony presented at the trial on the merits, the Court is of the opinion that Plaintiffs have met the requirements under Rule 23(a) and 23(b)(2), Federal Rules of Civil Procedure, to certify the class as all Mexican-American voters in Kleberg County whose voting power has allegedly been diluted under the present apportionment plan for county commissioners.

History of Case

This suit was filed on January 26, 1978, seeking preliminary injunctive relief to enjoin the May, 1978, primary elections for county commissioners. A hearing on Plaintiffs' motion for preliminary injunction was held on February 3, 1978. All parties attended the hearing and

were represented by counsel. The testimony presented by the Plaintiffs was limited solely to their claim of numerical malapportionment. Plaintiffs used the 1978 voter registration list as the statistical base to support their claim of malapportionment. Plaintiffs maintained at the hearing on the preliminary injunction that the voter registration list provided more accurate data of the voting age population than did the 1970 census. Defendants, however, presented evidence which showed that the voter registration list was inaccurate because the names of voters who had moved or who had died had not been removed from the list. This Court denied Plaintiffs' motion for preliminary injunction on February 13, 1978, due to the uncertainty of Plaintiffs' data to provide an accurate statistical base for a claim of malapportionment.

Plaintiffs appealed from the denial of their motion for preliminary injunction. The Court of Appeals for the Fifth Circuit, on August 4, 1978, vacated this Court's decision and remanded the case for reconsideration in light of *Lister v. Commissioners Court,* 566 F.2d 490 (5th Cir. 1978). Trial on the merits was accordingly held on October 30 and 31, 1978.

Background

Kleberg County, Texas, is a unit of state government which was initially created in 1913. Pursuant to state law, the governing body of the county is the Commissioners Court, composed of four commissioners who are presided over by the County Judge. As directed by state law, the county has been divided periodically by the Commissioners Court into four commissioners' precincts. The residents of a given precinct elect a resident of that precinct to the position of county commissioner. Each

commissioner and the County Judge serve a term of four years. Elections are conducted alternatively in the four precincts; two commissioners are elected every two years. The County Judge is elected at-large.

Plaintiffs in this case represent two separate classes of voters. The first class represented by Plaintiffs consists of all registered voters in Kleberg County who are denied a vote of equal weight in the election of county commissioners due to the alleged malapportionment of the Commissioners Court precincts. This claim is a quantitative reapportionment claim. The second class represented by Plaintiffs consists of all Mexican-American voters in Kleberg County whose voting power has allegedly been diluted under the present apportionment plan. This claim is a qualitative reapportionment claim. Due to these separate and distinct claims, the Court will deal with each claim individually in this memorandum.

Quantitative Reapportionment: One Man, One Vote

Lister v. Commissioners Court, supra, involved a suit much like this case brought by Black residents of Navarro County, Texas, against the County Commissioners Court, alleging that the 1969 apportionment plan for Navarro County, "failed to meet population norms and . . . invidiously cancelled, diluted, and minimized the effect of the black vote in Navarro County." 566 F.2d at 491. The Court in *Lister* held that:

> "Regardless of the merits or the demerits of the 1969 plan, the County Commission had a clear duty to reapportion on the basis of the 1970 census, especially since its 1969 plan was not based on the 1960 census."

566 F.2d at 492.

The current apportionment plan for the commissioners' precincts in Kleberg County was implemented on December 9, 1968. The statistical base used for the 1968 reapportionment was the voter registration list for Kleberg County. The commissioners' precincts were not reapportioned following the completion of the 1970 census.

According to the 1970 census, the total population for Kleberg County is 33,166. The ideal precinct, based upon population, would therefore have 8,291 people. Precinct 1, the precinct with the largest population, has a population of of 9,928, or 19.73% more people than the ideal precinct, while Precinct 4, the precinct with the smallest population, has a population of 6,702, or 19.17% less people than the ideal precinct. The maximum deviation from the largest precinct to the smallest precinct is therefore 38.9%, which is well beyond the accepted limits for an apportionment plan approved by a legislative body. *Swann v. Adams,* 385 U.S. 440 (1967); *Ferguson v. Winn Parish Police Jury,* 528 F.2d 592 (5th Cir. 1976).

Defendants must therefore reapportion the current Commissioners Court precincts in order to bring the precincts in line with the one-man, one-vote principle. The 1970 census data should be used as the statistical basis for apportioning the Commissioners Court precincts.

Qualitative Reapportionment: Voting Dilution

The majority of the testimony at the trial on the merits concerned the Plaintiffs' claim of voting dilution. Plaintiffs allege that the present apportionment plan for the commissioners' precincts unconstitutionally dilutes the voting power of Mexican-Americans in Kleberg County.

The Fifth Circuit, in *Nevett v. Sides,* 571 F.2d 209 (1978), held that the Supreme Court's decision in *Washington v. Davis,* 426 U.S. 229 (1976), "requires a showing of intentional discrimination in racially based voting dilution claims founded on the fourteenth amendment." 571 F.2d at 215. While *Nevett v. Sides, supra,* limited its holding to cases involving racial discrimination, 571 F.2d at 218, fn. 11, this Court finds that the standards for judging voting dilution claims stated in *Nevett v. Sides, supra,* and *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir. 1973), aff'd on other grounds, *sub. nom., East Carrol Parish School Board v. Marshall,* are also applicable to voting dilution claims of ethnic minorities, as in this case.

The issue in a dilution case is:

> " . . . whether the influence of a given racial group has been distorted because its members have been denied equal access to political processes such as party nominating procedures, registration, and, of course, voting."

Nevett v. Sides, supra, at 216.

A showing of intentional discrimination may be satisfied by either direct or circumstantial evidence. The Plaintiff must show that the plan under attack was either adopted with discriminatory intent, or, that the plan, though neutral when adopted, is maintained because of invidious racial or ethnic considerations. *Nevett v. Sides, supra,* at 221-222.

Plaintiffs in this case present no evidence, either direct or circumstantial, to show that the current apportionment plan was adopted for any discriminatory purpose.

The only evidence that was presented that concerned the enactment of the present apportionment plan was a letter dated June 22, 1967, from County Judge B. A. Brown to all the commissioners, in which Judge Brown stated that the commissioners' precincts needed to be reapportioned in accordance with the "one-man, one-vote principle." (Plaintiffs' Exhibit 1 from Hearing on Preliminary Injunction.) No mention is made of ethnic considerations in Judge Brown's letter. Plaintiffs therefore failed to show that the current apportionment plan for commissioners' precincts was enacted for any discriminatory purpose.

Nor did Plaintiffs present any direct evidence to show that the current apportionment plan is maintained due to discriminatory purposes.

Because no direct evidence of intentional discrimination was shown, this Court must therefore consider Plaintiffs' claim of voter dilution in light of the standards articulated in *Zimmer v. McKeithen, supra,* at 1305, to determine whether, taken "in the aggregate," they point to dilution. *Nevett v. Sides, supra,* at 224.

The primary factors which the Court must consider on the issue of dilution when single-member districts are involved are the group's accessibility to the political process, the responsiveness of representatives to the "particularized interests" of the group, and the effect of past discrimination upon the group's participation in the election system.

Primary Factors

A. *Access to the political process.*

The major thrust of the Plaintiffs' claim of voter dilution concerns the very high percentage population of Mexican-Americans in Precinct 4 which the Plaintiffs con-

tend concentrates the strength of Mexican-Americans in one precinct in order to minimize their strength in other precincts. While the apportionment plans in *Kirksey v. Board of Supervisors,* 554 F.2d 139 (5th Cir.), *cert. denied,* 434 U.S. 968 (1977), and *Robinson v. Commissioners Court,* 505 F.2d 674 (5th Cir. 1974), operated to cancel out minority participation by "slicing up" the minority population, the Plaintiffs claim that the present apportionment scheme for county commissioners' precincts operates to minimize the voting strength of Mexican-Americans in Kleberg County by allegedly concentrating Mexican-American voting strength in one commissioners' precinct. This precinct is Precinct 4, in which the population is 95% Mexican-American.

According to the 1970 census, the ethnic and racial breakdown of the population in Kleberg County is 53% Anglo, 44% Mexican-American, and 3% Black. The population breakdown in each commissioners' precinct by ethnic and racial groups is as follows:

Population by Precincts (1970 Census)

Precinct	*Total Population*	*Mexican-American*	*Anglo*	*Black*
1	9,928	4,002	5,926	-0-
2	9,269	2,865	6,404	-0-
3	7,267	1,337	4,932	998
4	6,702	6,413	288	-0-

Percentage Population by Precinct (1970 Census)

Precinct	*% Mexican-American*	*% Anglo*	*% Black*
1	40.31	59.69	0
2	30.9	69.1	0
3	18.4	68.0	13.6
4	95.7	4.3	0

The breakdown of registered voters by ethnic and racial groups is as follows:

Registered Voters by Precinct
(1978 Voter Registration)

Precinct	*% Mexican-American*	*% Anglo*	*% Black*
1	43.03	56.97	0
2	29.14	70.86	0
3	17.66	79.33	3.01
4	95.72	4.28	0

An examination of the voter registration statistics, when compared with the census data, shows that the percentage of Mexican-Americans in Kleberg County who are registered to vote is almost equal to the percentage of Mexican-Americans living in each precinct. The situation in Kleberg County is therefore different from the situation mentioned by the Court in *Graves v. Barnes,* 343 F. Supp. 704, 733 (W.D. Tex. 1972), aff'd. in part *sub nom., White v. Regester,* 412 U.S. 755 (1973), in which the Court stated that Mexican-Americans in Bexar County register to vote at very low rates, approximately 30%. The high percentage of Mexican-American registered voters in Kleberg County certainly indicates that Mexican-Americans have access to the ballot box in Kleberg County.

Nor are Mexican-Americans denied access to the slating of candidates in Kleberg County. As a factual matter, the Republican Party in Kleberg County has little, if any, voice in the election of candidates to public office. Securing the nomination in the Democratic primary election in Kleberg County is tantamount to election. County Judge McDaniel, who was Democratic Party County Chairman

prior to his election as County Judge, stated that Mexican-Americans in Kleberg County are very active in Democratic Party politics, including nominating procedures. A Mexican-American has been elected Commissioner of Precinct 4 since 1968, when the current apportionment plan under attack by the Plaintiffs was enacted. Prior to 1968, a Mexican-American had never served as a county commissioner.

The current state representative for Kleberg County, Irma Rangel, is a Mexican-American. Ms. Rangel was also the County Democratic Party Chairwoman for Kleberg County prior to being elected state representative. The elected state senator for Kleberg County is also a Mexican-American. In addition to state and county offices, since 1968 Mexican-Americans have served as mayor, city manager, and city commissioners in the City of Kingsville, the county seat for Kleberg County.

Moreover, approximately one-half of the Democratic Party precinct chairmen in Kleberg County are Mexican-Americans. Judge McDaniel also stated that Mexican-Americans and Anglos work together to support the election of Democratic Party candidates on the national, state, and local levels.

Given the voter registration of Mexican-Americans and, more importantly, their participation in the county nominating procedures and county Democratic Party politics, *see, Kirksey v. Board of Supervisors, supra,* fn. 10 at 143, the Court concludes that the Plaintiffs have failed to show that the current apportionment scheme for the Kleberg County Commissioners' precincts denies Mexican-Americans access to the political process.

B. *Responsiveness of the Commissioners' Court to the Particularized Interests of Mexican-Americans*

The second of the primary factors to be considered by the Court is the degree of responsiveness which the Commissioners Court has exhibited toward the particularized interests of the Mexican-American electorate. The Plaintiffs in particular contend that the County Commissioners' selection of sites for county projects and expenditures of funds for such projects has failed to adequately represent the interests of Mexican-Americans. Plaintiffs specifically contend that the County Commissioners have failed to build county buildings and recreational facilities within Precinct 4, the predominantly Mexican-American precinct. In support of this contention, Plaintiffs cite as examples of the unresponsiveness of the Commissioners Court the fact that the county courthouse, county library, Dick Kleberg Park, the Riviera Fishing Pier, the county airport, and the new county hospital are located in precincts other than Precinct 4. After reviewing the evidence, the Court concludes that the County Commissioners had legitimate and nondiscriminatory reasons for locating these county facilities in precincts other than Precinct 4. The Court further finds that the location of these county facilities does not indicate that the County Commissioners Court is unresponsive to the particularized interest of Mexican-Americans.

Both the county courthouse and the county library are located in downtown Kingsville in Precinct 1 near the boundary line between Precincts 1 and 4. Both were built over fifty (50) years ago. The Court fails to see what relationship, if any, the current apportionment plan has to county buildings that were constructed long before the apportionment plan came into existence. The Court

therefore finds that the location of the county courthouse and county library, and the continued expenditure of funds for the maintenance of these buildings, are not indicative of a lack of responsiveness to the particularized interests of Mexican-Americans.

Plaintiffs also contend that the location of Dick Kleberg Park in Precinct 3 indicates the unwillingness of the County Commissioners to locate county facilities in Precinct 4. Dick Kleberg Park is a 200-acre park owned jointly by the City of Kingsville and Kleberg County. The park is located within the Kingsville city limits on land donated by the King Ranch. Testimony at trial showed that Dick Kleberg Perk was not located in Precinct 4 for the same reasons that it was not located within Precincts 1 and 2: the tract of land given to the city and county to build the park was the best site for a park, given its location within the city limits, which made it easily accessible to people in *all* precincts in the county.

While no evidence was presented as to when the land for the park was donated to the city and county, the evidence did show that the park has been developed to provide maximum recreational use to the citizens of Kleberg County. The park has a swimming pool, several baseball fields, tennis courts, a golf course, picnic areas, camping areas, and an Exposition Hall for dances and rodeos. A creek which flows through the park has been dammed for recreational purposes. Judge McDaniel testified that all county Little League teams, with the exception of the Little League teams from the unincorporated town of Riviera, play their games in Dick Kleberg Park. The Riviera Little League has their own baseball park on a 10-acre site in Riviera which the Precinct 3 County

Commissioner was responsible for procuring and developing.

Plaintiffs also point to the location of a county park in Precinct 1 rather than Precinct 4 as an indication of the lack of responsiveness of the County Commissioners to the needs of the people in Precinct 4. Very little testimony was presented concerning this park. Judge McDaniel stated that the United States Navy gave the county 533 acres for the park. No testimony was presented as to what facilities, if any, are located in the park, or to what extent, if any, the county has developed the land for a public park. The testimony is uncertain as to whether this park even has a name. Based upon the meager testimony, the evidence is insufficient for the Court to make any findings of fact concerning the location of this park and the alleged unresponsiveness of the County Commissioners Court.

Plaintiffs also complain about the expenditure of funds for the Riviera Fishing Pier. The pier is located in Precinct 3 and is a public fishing pier located on Baffin Bay. Precinct 3 is the only precinct in the county with public access to salt water recreation. The Court finds that the expenditure of funds for a public salt water fishing pier, located in the only precinct with public access to Baffin Bay or the Laguna Madre, is not an indication of unresponsiveness of the County Commissioners to the particularized interest of Mexican-Americans.

The location of the county airport in Precinct 2 rather than Precinct 4 was also presented as evidence of the Commissioners' unresponsiveness to the needs of Mexican-Americans. The testimony showed that the county airport was located in Precinct 2 because it was the only

site approved by the Federal Aviation Administration due to the location of the Naval Air Station in Kleberg County. The Court therefore finds that this argument by the Plaintiffs is without merit.

Plaintiffs also feel that the new Kleberg County Hospital should have been located in Precinct 4. Judge McDaniel testified that the Commissioners Court viewed five possible sites, one of which was in Precinct 4, and concluded that the site in Precinct 1 which was offered by the Otis West family and the King Ranch was the best site for the new hospital. Judge McDaniel stated that the site selected for the hospital is directly accessible to emergency vehicles coming from all parts of the county. Judge McDaniel also stated that one of the problems with the old hospital was that it was located near a residential section which restricted expansion of the hospital and created complaints about inadequate parking and crowded conditions. The new hospital site therefore was selected to obviate these problems; it is located in an area away from residential sections in order to allow for future expansion.

Plaintiffs point to the fact that Mr. Fil Garcia and the Kleberg County League of United Latin American Citizens (LULAC) offered the county two 15-acre sites in Precinct 4 on which to build the county hospital. The testimony showed, however, that these two tracts of land were not offered to the county until *after* the Commissioners Court had accepted the offer by the Otis West family and the King Ranch to donate a 10-acre tract of land in Precinct 1 for the county hospital. More importantly, Mr. Fil Garcia admitted on cross-examination that in his opinion the site on which the new hos-

pital will be located was a better location for the hospital than the sites offered by his family and LULAC.

Plaintiffs also feel that the Commissioners Court is unresponsive to the needs of the citizens of Riviera, Texas, which is an unincorporated town located in Precinct 3 of Kleberg County, in failing to provide adequate water drainage. Plaintiffs at trial particularly complained of flooding that occurred in 1977 when it rained 24 inches in 24 hours, with 18 inches falling in a 4-hour period. (See Plaintiffs' Exhibits 59-69). While Judge McDaniel did acknowledge that a drainage problem did exist in Riviera, certainly no drainage system would be able to withstand 24 inches of rain in a 24-hour period. The testimony also showed that Commissioner Hubert, the County Commissioner for Precinct 3, *personally* helped evacuate families threatened by the flood and established facilities in a local school where the flood victims could stay until the flood waters had subsided. Such conduct on the part of Commissioner Hubert certainly indicates that he is responsive to the needs of the citizens in his precinct.

Testimony also showed that Commissioner Hubert had talked to then Governor Dolph Briscoe concerning the drainage problem. Governor Briscoe arranged a meeting between Commissioner Hubert and the Highway Department to see if Kleberg County and the Highway Department could work together to alleviate the drainage problem in Riviera. The Highway Department, however, turned down Commissioner Hubert's proposal allowing the county to construct a drainage ditch in the median of U.S. Highway 77.

In spite of the efforts by Commissioner Hubert to remedy the acknowledged drainage problems in Riviera, the

fact remains that the County Commissioners have still failed to remedy the poor drainage in Riviera. Nevertheless, while Mexican-Americans in Riviera have a very legitimate concern about the drainage problems, that concern is shared by Anglos in Riviera as well. The failure of the County Commissioners to remedy this condition cannot therefore be due to the failure of the Commissioners to be responsive to the *particularized interests* of Mexican-Americans.

After considering all the specific complaints raised by the Plaintiffs, the Court concludes that the Plaintiffs have not met their burden of proof of showing that the County Commissioners are unresponsive to the particularized interest of the Mexican-American community in Kleberg County. The County Commissioners were able to point to specific and legitimate nondiscriminatory reasons explaining why the county facilities in question were not located in Precinct 4.

C. *Effects of Past Discrimination on Access to the Election System*

The final task for the Court in considering the *Zimmer* primary factors is to make a determination of whether or not the existence of past discrimination in general precludes the effective participation in the election system today.

Although the poll tax undoubtedly discriminated against minorities, it was declared unconstitutional in Texas in 1966. *See, United States v. State of Texas,* 252 F. Supp. 234 (W.D. Tex. 1966), affm'd., 384 U.S.. 155 (1966). The past practice of restrictive covenants excluding certain ethnic groups from neighborhoods has been unenforceable since 1948. *See, Shelly v. Kraemer,* 334 U.S. 1 (1948).

This Court is not so naive as to believe that all discrimination by all the citizens in Kleberg County has been eliminated. Indeed, Plaintiffs presented testimony concerning a meeting that occurred during the 1974 Kingsville City Commissioners race in which some unidentified businessmen called a meeting in an attempt to get Anglo candidates to withdraw from the race to prevent a splitting of the Anglo vote. The evidence also showed, however, that none of the Anglo candidates withdrew from the race, that the meeting was denounced in the local press by both Anglos and Mexican-Americans, and that the Anglo candidates supported by the group who called the meeting did not win the election.

The issue to be determined in this case is not whether discrimination existed in the past, but whether or not the history of discrimination *precludes effective participation in the election process today*.

The evidence presented at trial showed that while no Mexican-American had ever served as a County Commissioner prior to 1968, a Mexican-American has always been elected County Commissioner for Precinct 4 since the enactment of the current apportionment plan under attack by the Plaintiffs. Mexican-Americans actively participate in the slating and election processes in Kleberg County for national, state, county, and city offices. Mexican-Americans in Kleberg County have been appointed to positions of authority on the Kleberg County Hospital Board, the Kingsville-Kleberg County Health Board, the Kingsville-Kleberg County Park Board, and the Kingsville-Kleberg County Library Board. In short, Mexican-Americans are able to participate in all phases of the political process in Kleberg County.

Even though there has been discrimination against Mexican-Americans in the past, the Court concludes that the current apportionment plan does not preclude Mexican-Americans from effectively participating in the election system today.

Enhancing Factors

The Fifth Circuit, in *Nevett v. Sides, supra,* directed district courts to also make specific findings with regard to the enhancing factors enumerated in *Zimmer v. McKeithen, supra.* However, *Zimmer v. McKeithen* and *Nevett v. Sides* both involved voting dilution claims of multi-member districts. The *Zimmer* enhancement criteria of (1) the existence of large districts, (2) majority vote requirements, (3) anti-single shot voting provisions, and (4) the lack of provision for at-large candidates running from particular geographical subdistricts are not relevant in voting dilution cases involving single-member districts. *See, Blacks United, Etc. v. City of Shreveport,* 571 F.2d 248, 255, fn. 6 (5th Cir. 1978).

Conclusion

The Court finds that the present apportionment plan for the election of the County Commissioners violates the one-man, one-vote principle and is therefore unconstitutional. The Court also finds that the Plaintiffs have failed to meet their burden of proof in their voting dilution claim on all of the applicable *Zimmer* criteria. The Court therefore concludes that an aggregate of the *Zimmer* criteria preponderates in favor of the Defendants.

The Defendants, nevertheless, will have to reapportion the County Commissioners precincts based upon the 1970

census in order to insure adherence to the one-man, one-vote principle.

The initial burden of fashioning a constitutionally permissible remedy is on the County Commissioners Court. The Supreme Court of the United States has recently written,

> When a federal court declares an existing apportionment scheme unconstitutional, it is . . . appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new . . . plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution. *Wise v. Lipscomb,* 437 U.S. 535 (1978).

If the Commissioners Court is unwilling or unable to present a proposed plan that will pass constitutional muster, it will then become the "unwelcome obligation" of the Court to do so. *Connor v. Finch,* 431 U.S. 407, 415.

With that in mind, the Defendants are hereby directed to submit a proposed new plan by the 13th day of November, 1979. The Court shall hold a hearing on the 10th day of December, 1979, to determine the validity of the proposed new plan, at 9:00 a.m.

Costs are hereby taxed against the Defendants. Plaintiffs are herby awarded reasonable attorney's fees. A hearing on attorney's fees will be set by the Court at a later time.

IT IS SO ORDERED.

SIGNED this 2nd day of October, 1979.

/s/ OWEN D. COX
United States District Judge

APPENDIX B

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C.A. NO. C-78-11

JOSE SANCHEZ, ET AL.

v.

W. C. McDANIEL, ET AL.

ORDER

(Filed January 10, 1980)

This suit was brought by Plaintiffs, who are Mexican-American residents of Kleberg County, Texas; and this Court has certified it as a class action.

Plaintiffs complain that the current Commissioners' Court election precincts in Kleberg County, as they now exist, violate the one-man, one-vote principle. By its Memorandum and Order dated October 2, 1979, this Court concluded that the present apportionment plan for the election of the County Commissioners in that county violates the one-man, one-vote principle and is therefore unconstitutional.

Plaintiffs also allege that the Commissioners' Court precincts were drawn to dilute the voting strength of Mexican-Americans in Kleberg County. After a trial on the merits, the Court found that the apportionment plan for the Commissioners' Court precincts did indeed violate the one-man, one-vote principle and ordered the Com-

missioners' Court to submit a new apportionment plan to be presented to the Court for its review. The Court also found that the Plaintiffs failed to meet their burden of proof under *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir. 1973), aff'd. on other grounds *sub nom, East Carroll Parish School Board v. Marshall,* 424 U.S. 636 (1976), to establish their voting dilution claim.

On December 10, 1979, the Court heard the Plaintiffs' objections to the proposed reapportionment plan submitted by the Defendants. At the hearing, the Plaintiffs did not object to the proposed plan on the basis that it did not comply with the one-man, one-vote principle, but instead objected to the plan because it had not been pre-cleared under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The Plaintiffs orally moved this Court to enjoin the 1980 primary elections until the proposed plan was pre-cleared under § 5, and subsequently moved by written motion for a preliminary injunction. Briefs in support of said motion were filed on December 17, 1979.

The Court has reviewed the proposed reapportionment plan submitted by the Defendants and has considered the Plaintiffs' objections to it. Subsequent to such review, this Court concluded that the proposed plan complies with the one-man, one-vote principle and should therefore be implemented for the purpose of conducting the 1980 elections. Also, it is the opinion of the Court that the proposed plan is a court-ordered plan rather than a court-adopted plan and therefore is not subject to pre-clearance provisions of the Voting Rights Act.

The Supreme Court has explicitly held that, "A decree of the United States District Court is not within reach of Section 5 of the Voting Rights Act." *Connor v. Johnson,*

402 U.S. 690, 691 (1971). In *East Carroll Parish School Board v. Marshall,* 424 U.S. 636 (1976), the Supreme Court stated that:

> "In any event, we agree with the [Fifth Circuit] Court of Appeals, *Zimmer v. McKeithen,* 467 F.2d at 1383, 485 F.2d at 1302, n. 9, that court-ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by § 5. Had the East Carroll police jury reapportioned itself on its own authority, clearance under § 5 of the Voting Rights Act would clearly have been required."

424 U.S. at 638-639, n. 6.

The Kleberg County Commissioners' Court did not reapportion the Commissioners' Court precincts on their own authority, but instead did so in response to a court order. While the Court is aware of the conflicting opinions of the Fifth Circuit concerning the need for preclearance in cases similar to this case, *compare Zimmer v. McKeithen,* 485 F.2d 1297, 1302, n. 9 (5th Cir. 1973) (*en banc*), with *Calderon v. McGee,* 584 F.2d 66 (5th Cir. 1978), on motion for rehearing, 589 F.2d 909 (1979), the Court is of the opinion that the reaportionment plan at issue is not subject to the pre-clearance provisions of § 5 of the Voting Rights Act.

The reapportionment plan submitted to the Court by the Defendants is therefore approved for the 1980 elections. The 1980 primary and general elections should be conducted under this plan.

IT IS SO ORDERED.

SIGNED this 10th day of January, 1980.

/s/ OWEN D. COX
United States District Judge

APPENDIX C

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C.A. NO. C-78-11

JOSE SANCHEZ, ET AL.

v.

W. C. McDANIEL, ET AL.

ORDER

(Filed January 29, 1980)

On January 14, 1980, the Court filed an order implementing a new apportionment plan for the 1980 elections for the election of the County Commissioners for Kleberg County. Plaintiffs filed a notice of appeal from this order on January 23, 1980, along with several other motions, including a motion for reconsideration and motion to convene a three-judge panel.

Once a notice of appeal is filed, jurisdiction over the case passes from the District Court to the Court of Appeals. This Court therefore does not have jurisdiction to rule on Plaintiffs' motion for reconsideration and motion to convene a three-judge panel.

Plaintiffs also filed a motion for injunction pending appeal at the same time that they filed their notice of appeal. This Court does have jurisdiction to rule on the motion for injunction pending appeal. Nevertheless, after

considering such motion, the Court is of the opinion that it should be, and hereby is, denied.

IT IS SO ORDERED.

SIGNED this 29th day of January, 1980.

/s/ OWEN D. COX
United States District Judge

APPENDIX D

(615 F.2d 1023)

Jose SANCHEZ et al.,
Plaintiffs-Appellants,

v.

W. C. McDANIEL et al.,
Defendants-Appellees.

No. 80-1108.

United States Court of Appeals,
Fifth Circuit.

April 14, 1980.

Appeal from the United States District Court for the Southern District of Texas.

Before CHARLES CLARK, VANCE, and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

This action is before us on the appellants' motions for summary reversal or, in the alternative, an injunction pending appeal. The judgment of the district court is vacated and this action is remanded to the district court for further proceedings consistent herewith.[1]

The district court determined that the 1968 Kleberg County, Texas, apportionment plan violated the constitutional principle of one man, one vote. It directed the appellees to submit a proposed reapportionment plan by

1. It is appropriate to dispose of this case summarily. See *Groendyke Transportation, Inc. v. Davis*, 5 Cir., 1969, 406 F.2d 1158.

November 13, 1979. In response to the district court's order, the Kleberg County Commissioners' Court employed Dr. Robert T. Nash to prepare a reapportionment plan. The Commissioner's Court reviewed Dr. Nash's work and officially adopted his proposal as the plan it would submit to the district court.

The district court held a hearing on December 10, 1979, to determine the validity of the proposed reapportionment plan. In an order dated January 10, 1980, the district court rejected the appellants' objections to the proposed reapportionment plan, approving its use for the 1980 primary and general elections. In so doing, the court reasoned that, because the "Kleberg County Commissioners' Court did not reapportion the Commissioners' Court precincts on their own authority, but instead did so in response to a court order," the reapportionment plan "is a court-ordered plan rather than a court-adopted plan and therefore is not subject to [the] pre-clearance provisions of the Voting Rights Act." We disagree.

The United States Supreme Court in *Wise v. Lipscomb*, 437 U.S. 535, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978), considered the relationship between court-ordered reapportionment plans and legislative reapportionment plans. The Court recognized that the reapportionment of legislative bodies is the responsibility of the legislature, stating that it is only "when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, [that] it becomes the 'unwelcome obligation' . . . of the federal court to devise and impose a reapportionment plan pending later legislative action." *Id.* at 540, 98 S.Ct. at 2497, 57 L. Ed2d at 417. It recognized that

> [w]hen a federal court declares an existing apportionment scheme unconstitutional, it is . . . appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new *legislative* plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution.

Id. (Emphasis added.)

A proposed reapportionment plan submitted by a local legislative body does not lose its status as a legislative rather than court-ordered plan merely because it is the product of litigation conducted in a federal forum. As the Supreme Court stated, "[a] new reapportionment plan enacted by a State, including one purportedly adopted in response to invalidation of the prior plan by a federal court will not be considered 'effective as law,' . . . until it has been submitted and has received clearance under § 5 [of the Voting Rights Act of 1965]." *Id.* at 542, 98 S.Ct. at 2498, 57 L.Ed.2d at 418. By submitting a proposed reapportionment plan to the district court, the Kleberg County Commissioners' Court complied with and fulfilled its legislative responsibility. *See Id.* at 546, 98 S.Ct. at 2500, 57 L.Ed.2d at 421. The proposed legislative plan is subject to the preclearance provisions of § 5 of the Voting Rights Act of 1965. Accordingly, the district court erred in considering the constitutionality of the proposed plan.

We are aware that the Kleberg County Commissioners' primary election presently is scheduled for May, 1980.

On remand, the district court may, on appropriate motion, enter such relief as is necessary and appropriate.

Because of our disposition of this action, we pretermit deciding and intimate no opinion as to the validity of the proposed reapportionment plan.

VACATED and REMANDED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Office of the Clerk

Gilbert F. Ganucheau
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

April 25, 1980

Mr. Jesse E. Clark, Clerk
U. S. District Court
P. O. Box 2567
Corpus Christi, TX 78403

NO. 80-1108—JOSE SANCHEZ, ET AL. v.
W. C. McDANIEL, ET AL.
(D. C. No. CA-C78-11)

Dear Mr. Clark:

The Court has directed that the mandate be issued this day in the above referenced case. Therefore, enclosed is a certified copy of the opinion and judgment of this Court issued as and for the mandate.

Returned, under separate cover, is the box of exhibits filed in this case.

Please acknowledge receipt on the attached copy of this letter.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

By: Brenda Houck
Deputy Clerk

/bh
enclosure
cc: Mr. Bob Parmley
Mr. Richard A. Hall

APPENDIX F

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C. A. No. C-78-11

JOSE SANCHEZ, ET AL.

v.

W. C. McDANIEL, ET AL.

ORDER

(Filed April 30, 1980)

On April 30, 1980, this case was called for a hearing on Plaintiff's motion for temporary injunction. Having considered the testimony presented, the arguments of counsel, and the equities in the present case, the Court has concluded that it should not enjoin the May 3, 1980, primary election in Kleberg County.

At the hearing on Plaintiff's motion, Kleberg County Judge W. C. McDaniel testified that the names of the candidates running for the two County Commissioner positions and for the three Constable positions up for election this year have already been programmed into the voting machines scheduled to be used in the May 3rd primary in Kleberg County. Judge McDaniel further testified that the names of those candidates could not be deleted from the voting machines in time for the primary election because it would take at least ten days to do so. Were the Court, on election eve, to enjoin the County Commissioner and Constable primary elections, it would

engender confusion among the electorate and hamper the election officers' task of conducting the primary for other Kleberg County offices in an orderly and efficient manner.

The Court further notes that this is a primary, not a general, election and therefore it will not work a change in the composition of the County Commissioners Court nor will it result in the election of new Constables in Precincts 1, 3 and 4. Permitting this primary election to go forth cannot, therefore, abridge or dilute anyone's voting rights in Kleberg County, and the Plaintiffs will suffer no irreparable harm if the primary election is held in Kleberg County.

For the foregoing reasons, the Court is of the opinion that the May 3, 1980, primary election in Kleberg County should not be enjoined. Plaintiffs' motion for temporary injunction is hereby denied.

The Court is of the opinion, however, that the results of the primary election for the offices of County Commissioner in Precincts 1 and 3, and for Constable in Precincts 1, 3 and 4, should not be announced by the Kleberg County Clerk following the tabulation of the votes.

It is therefore ORDERED that the Kleberg County Clerk is hereby enjoined from announcing the winning candidates of the May 3rd primary election for County Commissioner in Precincts 1 and 3, and for Constable in Precincts 1, 3 and 4, until further order of this Court.

IT IS SO ORDERED.

SIGNED this 30th day of April, 1980.

/s/ OWEN D. COX
United States District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk
Gilbert F. Ganucheau
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

May 12, 1980

TO ALL PARTIES LISTED BELOW:

No. 80-1108—JOSE SANCHEZ, ET AL, v.
W. C. McDANIEL, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

By: SALLY HAYWARD
Deputy Clerk

cc: Mr. Bob Parmley
Mr. Richard A. Hall

APPENDIX H

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C. A. NO. C-78-11

JOSE SANCHEZ, ET AL.

v.

W. C. McDANIEL, ET AL.

ORDER

In its order of April 14, 1980, the Fifth Circuit Court of Appeals, in Cause No. 80-1108, held that the reapportionment plan for the commissioners precincts in Kleberg County, Texas, which had been previously ordered into effect by this Court, was not a court-ordered plan. Thus, preclearance pursuant to Section 5 of the Voting Rights Act of 1968, as amended, is required. This was made clear when the Defendants' recent motion for rehearing before said Court of Appeals *en banc* was denied on May 12, 1980.

On June 16, 1980, a hearing was held on Plaintiffs' motion to require the Defendants to begin the Section 5 preclearance procedure, and at the conclusion of said hearing the Court took the matter under advisement.

The Court having considered Plaintiff's motion is now of the opinion that it should be granted.

This Court does now order that Defendants immediately begin the Section 5 preclearance procedure in the best interest of justice and judicial economy and there is

no valid reason for further delay in commencing the Section 5 preclearance procedure.

It is therefore ORDERED that the Defendants immediately begin the Section 5 preclearance pursuant to 42 U.S.C. § 1973c.

SIGNED this 20th day of June, 1980.

/s/ OWEN D. COX
United States District Judge

CERTIFICATE OF SERVICE

This is to certify that on August _____, 1980, three copies of the foregoing Petition for Writ of Certiorari and Appendix were served upon respondents by depositing the same in the United States Post Office, first-class postage prepaid, properly addressed to Mr. Bob Parmley, Texas Rural Legal Aid, Inc., 504 Sidney Baker Street, Kerrville, Texas 78028, their attorney.

RICHARD A. HALL